No. 90-1570

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

ELTON EUGENE GUNTER,

Petitioner,

v.

VIRGINIA STATE BAR, *ex rel,*
THE SEVENTH DISTRICT COMMITTEE and
BILLY J. TISINGER, ESQUIRE,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Virginia State Bar initiated a disciplinary proceeding against Petitioner after receiving a complaint of misconduct from a member of the Virginia State Bar Disciplinary Board. Therefore, the complaint was referred to a circuit court as permitted by Va. Code § 54.1-3935, rather than to an administrative proceeding before a Virginia State Bar disciplinary committee.

Petitioner objected to the fact that his case was to be heard by a circuit court, and he filed various motions seeking to remand the case to the District Committee and to discover the reason that the case was referred to a circuit court. He argued that the decision to proceed pursuant to § 54.1-3935 was a departure from the procedures set forth in Paragraph 13 of the Rules of the Supreme Court of Virginia and a violation of his right to due process and equal protection of the law. He did not raise a Sixth Amendment claim either in the trial court or before the Supreme Court of Virginia.

Petitioner's motions were denied because Paragraph 13(B)(5)(a) provides that disciplinary cases may be heard in a circuit court and because discovery is not required in disciplinary proceedings.

SUMMARY OF THE ARGUMENT

The decision below merely follows established precedent and does not conflict with the decisions of other courts. The Petition also relies upon facts that are not part of the record and claims that were never presented to the

state courts. Further, review of this case on certiorari is not warranted because the facts are unique and unlikely to recur.

Under Virginia law, a complaint of unethical conduct against an attorney may be heard either in a circuit court or in administrative proceedings conducted by the Virginia State Bar. While the two procedures may differ somewhat, both procedures provide the attorney with the due process protections to which he is entitled.

The Virginia Supreme Court relied upon established precedent in holding that the decision to hear a case in a circuit court rather than before an administrative committee of the Virginia State Bar does not violate an attorney's due process or equal protection rights. The attorney has no due process right to conduct discovery or to demand a preliminary hearing before his due process hearing.

REASONS FOR DENYING THE WRIT

I. The Judgment Below Is Based Upon Established Precedent And Does Not Conflict With The Decisions Of Other Courts

The decision of the Supreme Court of Virginia does not conflict with any decision of another state court of last resort or of a federal court of appeals. In fact, the decision faithfully follows well settled principles established by this Court. The decision in this case merely reaffirms that an attorney who is the subject of a disciplinary hearing is entitled to notice "of the nature of the charge referred against him and be given an opportunity to answer." (App. p.9.) This doctrine was established by

this Court in *In re Ruffalo*, 390 U.S. 544 (1968) *reh. denied*, 391 U.S. 961 (1968), and was followed by the court below.

Further, the opinion of the Supreme Court of Virginia follows precedent of this Court in holding that the Petitioner did not have a due process right to conduct discovery and in upholding the facial constitutionality of Virginia's binary disciplinary system. (App. pp.8-12.) The remainder of the opinion construes a Virginia statute and rule of court that allow the Virginia State Bar to file disciplinary charges either as administrative proceedings or before a circuit court. In short, the decision of the Supreme Court of Virginia merely applies settled principles in a routine attorney disciplinary case, and review by this Court is not warranted.

II. The Petition Relies Upon Facts That Are Not Part Of The Record

Petitioner relies upon an incomplete and inaccurate rendition of a telephone conversation to support the proposition that his case has been the only disciplinary case to be referred to a court rather than to a committee of the Virginia State Bar. (Pet. p. i.) His reliance on evidence that is not part of the record demonstrates not only that this Court must resolve a factual controversy, but also that it must do so on an incomplete record. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Furthermore, even if Petitioner's statement were correct, it merely illustrates that the questions raised in the Petition turn on the peculiar facts of this case and are of interest only to the parties to it. If these facts have never

arisen before, they are not likely to recur again and this case is too narrow to warrant review by this Court on certiorari.

III. This Court Lacks Jurisdiction To Hear Petitioner's Sixth Amendment Claim

Petitioner argues that he was deprived of his right to effective assistance of counsel because he was denied the right to conduct a hearing before his due process disciplinary hearing. This claim was not raised before either the trial court or the Supreme Court of Virginia. In *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969), this Court stated that "[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

IV. The Procedure Employed In This Case Did Not Violate Petitioner's Right To Due Process Of Law

In Virginia, the authority to discipline attorneys was originally vested in the circuit courts pursuant to Va. Code § 54.1-3935. The Supreme Court of Virginia created a separate system for disciplining attorneys "to develop a procedure which was more accessible to the public and more conducive to expeditious and effective management. . . . " Rosenfield, *A Brief Review of Virginia's Revised Disciplinary System*, Virginia Lawyer, September, 1990, p.30. A disciplinary proceeding can now be brought in the circuit courts pursuant to statute, or before the Bar pursuant to the Rules. Either the attorney or Bar Counsel may elect to have the case heard in the circuit court. Paragraphs 13(B)(5)(a) and 13(C)(5)(a)(ii).

The procedures employed in the circuit court differ from the procedures employed in administrative proceedings before the Virginia State Bar. However, both procedures provide an attorney with notice of the charges against him and an opportunity to answer those charges. Both procedures afford the attorney the opportunity to cross-examine the witnesses against him, testify in his own behalf, and compel the attendance of witnesses.

Petitioner does not argue that he was not given notice of the charges against him or an opportunity to answer those charges. He merely claims that he was not given the opportunity for a hearing in the forum of his preference. Petitioner has no due process right to demand a hearing before the Virginia State Bar Disciplinary Board rather than before a circuit court.

V. The Procedure Employed In This Case Did Not Violate Petitioner's Right To Equal Protection Of The Law

Petitioner argues that because the Virginia State Bar normally elects to proceed before the Disciplinary Board, it cannot elect to proceed before a circuit court without violating the attorney's right to equal protection of the law. To establish a violation of his equal protection rights, Petitioner must show that similarly situated persons are subject to disparate treatment and that this disparate treatment has no rational basis. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489 (1977).

There was a rational basis for presenting this case to the circuit court. The person who made the complaint against Petitioner was a member of the Disciplinary

Board. Serious due process questions could be presented by conducting a hearing before a panel containing a member who originally supplied the evidence of misconduct. *See, e.g., In re Murchison*, 349 U.S. 133, 137 (1955) ("Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."). Even if the complainant recused himself, there could be a public perception of impropriety when fellow Board members heard the case.

However, the issue is not whether the decision to resort to a court trial was mandated by the due process clause. The issue is whether the decision was rational rather than arbitrary and capricious. It is rational to file a disciplinary case in court rather than before the Disciplinary Board when a member of the Board made the complaint against the attorney.

Moreover, it is the fact that the complainant was a member of the Disciplinary Board that establishes that Petitioner is not similarly situated with other attorneys facing disciplinary proceedings. The due process considerations involved in this case do not arise when the complaint is made by a member of the public or another member of the Bar. Thus, Petitioner can not show that he is similarly situated with other attorneys facing disciplinary charges.

VI. The Due Process Clause Does Not Require Such Pre-Hearing Procedures As Discovery Or Preliminary Hearings On An Attorney's Defenses To Charges Of Misconduct

Petitioner complains that he was deprived of the opportunity to take discovery of the reason for the

referral of his case to the circuit court. Petitioner had the right to present any evidence he chose *at* his due process hearing in order to prove his claim that his equal protection and due process rights were being violated. However, he had no due process right to conduct discovery before that hearing. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case. . . . ").

Petitioner argues that the denial of his motion to remand the case to a district committee, without a hearing, violated his right to due process of law. The motion sets forth in detail the facts supporting the motion. Bar Counsel's right to proceed in a circuit court pursuant to Va. Code § 54.1-3935 is explicitly recognized in Paragraph 13(B)(5)(a) of the Rules of the Supreme Court of Virginia. Thus, the motion was correctly denied as a matter of law. Petitioner has no due process right to a preliminary hearing before his due process hearing in order to produce evidence in support of a motion to dismiss.

Furthermore, the reason that Bar Counsel chose to proceed pursuant to § 54.1-3935 was a matter of record. A member of the Disciplinary Board filed the complaint against Mr. Gunter. Thus, there was no reason to give him the opportunity to produce evidence that his case was treated differently than other disciplinary cases. If he was treated differently, it was because his case was different in that a member of the Disciplinary Board made the complaint against him.

CONCLUSION

For these reasons, the Virginia State Bar, Respondent herein, prays that the petition for writ of certiorari be denied.

Respectfully submitted,

Virginia State Bar, *ex rel*,
The Seventh District Committee

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